

file

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**

Application of Wagner's Port Sand Resort and
Campground for a Permit to Place a Marina on the
Bed of Big Sand Lake in the Town of LaFollette,
Burnett County, Wisconsin

Case No. 3-NW-94-07005P

Investigation on Motion of the Department of
Natural Resources of an Alleged Unlawful
Construction and Maintenance of Piers on the Bed
of Big Sand Lake, Town of LaFollette, Burnett
County, Wisconsin by Howard Wagner

Case No. 3-NW-94-07005I

FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMIT AND ORDERS

Pursuant to due notice hearing was held on May 7, 1997, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties agreed to allow a late submission to the record which was received on May 19, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wagner's Port Sand Resort and Campground and Howard Wagner, by

Bruce Anderson, Attorney
205 Main Street
P. O. Box 215
Balsam Lake, Wisconsin 54810

St. Croix Chippewa Indians of Wisconsin, by

Howard J. Bichler, Attorney
36 Hatten Avenue
Rice Lake, Wisconsin 54868

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. Wagner's Port Sand Resort and Campground (the applicant), 4904 Highway 70, Webster, Wisconsin, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place a marina on the bed of Big Sand Lake, Town of LaFollette, Burnett County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the NE 1/4 of the NW 1/4 in Section 4, Township 38 North, Range 15 West, Town of LaFollette, Burnett County. The above-described property abuts Big Sand Lake which is navigable in fact at the project site.

3. Big Sand Lake is approximately 1400 acres in size, all of which is located in Burnett County. A large portion of the lake is shallow, with water depths of six feet or less. Several of the proposed piers extend beyond the three foot water depth contour, which is approximately 80-90 feet below the ordinary highwater mark (OHWM) at the project site.

4. The applicant owns approximately 1068 feet of riparian frontage. The applicant proposes to construct a marina consisting of a series of attached docks with 65 slips. The applicants had originally sought a permit to place 82 slips. The current proposal is for a total of six separate structures extending a maximum of approximately 140 feet from shore. (See: Exhibit 28) Exhibit 28 clearly sets forth the proposed configuration and the reductions in size of Docks "A" and "D" which result in the new proposal for 65 slips. In summary, Dock A would be approximately 140 feet in length and would moor 16 boats. An existing boat launch dock would remain. Dock B would moor 12 boats. It would extend 135 feet into the water and be approximately 75 feet wide. Dock C would extend 135 feet into the water and would be 123 feet wide. It would moor 20 boats. Dock D would moor 9 boats and would also extend 135 feet into the water below the OHWM. Dock E would extend 88 feet into the water. It provides a slip for the residents of a cabin known as "Old Blue." Piers would be constructed of treated decking supported by green treated 4 by 4 posts in the bed of the lake. The piers would be removed annually.

5. The purpose is to provide mooring space for boats to dock on Big Sand Lake. The Wagners operate a resort which supports five existing pier structures that moor a total of approximately 50 boats for Port Sand Resort guests. The facility includes 85 improved campsites on a total of 54 acres of land.

6. The proposed structures will not materially obstruct existing navigation on Big Sand Lake.

7. The Department of Natural Resources issued a Notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. The Department received several timely objections to the permit application.

8. The Department of Natural Resources Northern Region staff conducted field investigations and allege that Mr. Howard Wagner is maintaining a number of pier structures on the bed of Big Sand Lake, in the NE 1/4 of the NW 1/4 of Section 4, Township 38 North, Range 15 West in the Town of LaFollette, Burnett County, Wisconsin in violation of secs. 30.12, 30.13 and 30.15, Stats., and without a permit from the Department of Natural Resources pursuant to sec. 30.12, Stats. It is further alleged that the piers, in their current number and configuration, interfere with the rights and interest of the public in Big Sand Lake.

9. John Haack, the DNR Area Water Regulation and Zoning Specialist, testified that the proposed 65 pier slips exceeded the "reasonable use" of this riparian parcel even for a "marina" providing public access to the lake. The DNR has drafted a non-binding Guidance Document (the Guidance) which attempts to incorporate public trust doctrine case law and provides a threshold for field staff making regulatory decisions in the context of processing Chapter 30, Stats., permits. (Exhibit 21) The Guidance attempts to quantify the common law principle that mooring privileges accrue in proportion to the amount of riparian frontage owned. The Guidance states that such numerical standards are "threshold figures" based upon the expertise of Department water management coordinators as to the existing practice throughout the State of Wisconsin. The threshold numbers assist staff in determining if a permit is necessary in the first instance, and provide a starting point for a discussion of what constitutes a reasonable use of a given riparian tract. These numbers are not absolutely applied as a rule, but rather "... identify the threshold beyond which there should be a more rigorous evaluation to determine whether adverse effects on public rights and interests in navigable waters are significant." (Exhibit 75, p. 2) The applicant, riparian owner of 1068 feet frontage, would be entitled to 22 slips under a strict application of the non-binding reasonable use guidance. (Haack)

However, Haack testified that the Guidance provides for a greater number of slips for the operators of public "marinas." Haack opined that a "reasonable use" of the project site would be to allow for a total of 32 slips, 22 to be leased seasonally and 10 slips to be made available on a daily basis. Further, under the DNR's recommendation, no watercraft could be moored at the boat launching pier which should be used exclusively to provide lake access. The Administrative Law Judge largely adopts Haack's recommendation as an appropriate balancing of public rights with those of the riparian owner. Accordingly, Docks "A" and "B" as proposed, shall be denied. Dock "D" shall be granted as described in Exhibit 22. Dock "C" shall be reduced to eliminate the eight southern most slips and the northern most "T" slips.

Dock "E" has long served only the cabin known as Big Blue and is part of the culture of the area. A permit for Dock "E" as set forth on Exhibit 22 is, accordingly, granted.

Any piers not authorized by this permit shall be removed prior to the May 1, 1998, opening of the next boating season.

10. A variety of aquatic vegetation is found at the proposed project site. This includes a diverse submergent plant community adjacent to existing docks and a stand of emergent plants in the near shore area. (See: Exhibit 3, Appendix 14) These aquatic plant communities are detrimentally impacted by boat propeller action and boat hull abrasion in the shallow water depths at the site. (Id.)

Numerous DNR witnesses provided undisputed expert testimony that the proposed project expanding existing piers in the area, would have a detrimental impact on aquatic plant communities in the area.

All of the expert testimony indicated that a reduction in the number of piers and resulting boat traffic would benefit plant communities in and around the project site.

11. Big Sand Lake is managed for fish species, which include largemouth bass, northern pike, walleye, black crappie, and bowfin. Walleye are stocked by the DNR, but no successful natural reproduction has yet been documented.

The proposed pier expansion is likely to detrimentally impact the near-shore fisheries habitat. Bulrushes along the near shore area at the site stabilize the shoreline and provide cover for numerous fish species, including northern pike.

In deeper water areas, cabbage weeds and other large leaf plants provide a good support for insects that are central to maintaining fishery values.

The DNR Area Fisheries Assistant Manager, Larry Damman, provided undisputed expert testimony that further development of the site would have a detrimental impact on fisheries habitat.

12. There have been numerous conflicts between users of Big Sand Lake over recent summers. In particular, there has been an unfortunate tension between lake shore property owners and other users of the lake. This tension has escalated to the point where an obnoxious individual has attempted to disturb lake shore property owners by shouting at them through a bullhorn, in an apparent effort to disturb their quiet enjoyment of their property.

The record did not tie any of this intentional rudeness directly to the applicant nor its guests. While there have been complaints against resort guests over the fifteen years the applicants have operated the business, Mr. Wagner received no complaints during the

1996 season. For the Wagners to have any influence over the behavior of their guests, they obviously must be informed of the specific offending conduct.

The Department provided detailed aerial photographs which documented how the unpermitted piers at the resort have expanded over the past 15 years. None of these expansions received a required permit. There is no question that congestion at the resort piers have exacerbated user conflicts on the lake. The reduced numbers of boats moored at the resort should result in less congestion and conflict in and around the project site.

13. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

14. The proposed structures will not reduce the effective flood flow capacity of Big Sand Lake upon compliance with the conditions in the permit.

15. The proposed structures will not adversely affect water quality nor will it increase water pollution in Big Sand Lake. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

16. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
3. The Division of Hearings and appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction or placement of the structures. This permit shall be effective May 1, 1998.
4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.
5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittees shall notify the DNR Water Management Specialist, not less than 5 working days before starting construction and again not more than 5 days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or rippedraped as appropriate to prevent erosion and siltation.
8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water Management Specialists, at least 5 working days in advance.
9. No more than 33 slips shall be moored at the piers as described above. A total of 22 slips shall be available for seasonal rental. A total of 11 slips shall be made available for daily moorings.
10. No watercraft shall be moored to the launching piers for a period of more than one hour. No watercraft shall be moored on pier walkways or moored or stored on the shoreline below the OHWM.
11. No more than one boat or other watercraft shall be moored at one time at any slip space.

12. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

ORDERS

WHEREFORE IT IS HEREBY ORDERED, pursuant to sec. 30.12 and 30.14, Stats., that the number of boats moored at Wagner's Port Sand Resort and Campground be reduced as described in detail in the above permit;

IT IS FURTHER ORDERED, that this reduction in the number of pier slips shall be effective May 1, 1998, and any piers not authorized by this permit shall be removed by said date.

Dated at Madison, Wisconsin on August 8, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By:



JEFFREY D. BOLDT

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.